1962

William K. Howard et al v. Mildred M. Howard et al : Petition of Appellant for Rehearing and Brief

Utah Supreme Court

Backman, Backman & Clark; Attorneys for Appellant;
Perris S. Jensen; Attorney for Respondents;

IN THE SUPREME COURT
of the
STATE OF UTAH

WILLIAM K. HOWARD, RUTH N. HOWARD, ROBERT D. HOWARD, AND SHIRLEY L. HOWARD,
Plaintiffs-Respondents,

—vs.—

MILDRED M. HOWARD,
Defendant-Appellant,

MILDRED M. HOWARD,
Defendant-and Third Party Plaintiff-Appellant,

—vs.—

WALKER BANK & TRUST COMPANY, as Administrator of the estate of L. W. Howard, deceased, WILLIAM K. HOWARD, RUTH N. HOWARD, ROBERT D. HOWARD and SHIRLEY L. HOWARD,
Third Party Defendants-Respondents.

Case No.
No. 9552

PETITION OF APPELLANT FOR RE-HEARING AND BRIEF

Appeal from Third District Court in and for Salt Lake County, Hon. A. H. Ellett, *Judge*

BACKMAN, BACKMAN & CLARK
1111 Deseret Bldg.
Salt Lake City 11, Utah
Attorneys for Appellant

PERRIS S. JENSEN
Walker Bank Bldg.
Salt Lake City, Utah
Attorney for Respondents

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The defendant and appellant respectfully requests a rehearing in the above entitled case upon the following grounds:

STATEMENT OF POINTS

POINT 1.

THE COURT ERRED IN HOLDING THAT UNDER THE FACTS A GRANT IS NOT SUSTAINABLE.

POINT 2.

THE COURT ERRED IN HOLDING THAT IT IS EITHER IMPOSSIBLE TO DETERMINE WHAT HOWARD HAD IN MIND, OR CONJECTURE INDULGED, ONE WOULD HAVE TO DIVINE THAT ANY NUMBER OF AREAS COULD BE SAID TO HAVE BEEN INTENDED.

POINT 3.

THE COURT ERRED IN HOLDING THAT ABSTRACTORS AND LAWYERS SHOULD BE ABLE TO TURN DOWN A TITLE BASED ON THE CONTENTIONS OF SUCH AN ASSERTED ILLUSIONARY INTENTION OF A DECEASED.

POINT 4.

THE COURT ERRED IN CONSIDERING THE LAST STATEMENTS IN THE DESCRIPTION AND IN TREATING THE SAME AS CALLS WHEN IT SHOULD HAVE REJECTED THE SAME AS BEING CUMULATIVE AND NOT A PART OF THE DESCRIPTION.

POINT 5.

THE COURT ERRED IN HOLDING THAT THE PROPERTY WHICH APPELLANT CONTENDS WAS INTENDED TO BE DESCRIBED CONTAINS CLOSE TO FIVE ACRES.

POINT 6.

THE COURT ERRED IN REFUSING TO REMAND THE CASE TO THE TRIAL COURT WHERE EXTRINSIC EVIDENCE MIGHT BE INTRODUCED TO EXPLAIN THE INTENT OF THE GRANTOR.

ARGUMENT

POINT 1.

THE COURT ERRED IN HOLDING THAT UNDER THE FACTS A GRANT IS NOT SUSTAINABLE.

It is recognized that the description contained in the deed here in question as it now stands is not a perfect description. This is the reason appellant filed her counter-action in this case, for reformation of the deed. There is an obvious omission in the description but the deed affords sufficient data to permit the omission to be supplied in aid of the description as given.

The authorities are to the effect that if the description as given sufficiently supplies the means of identifying the land to be conveyed, then it is valid and reformation is proper. Here the deed in question does just that, it supplies the means for identification. In comparing the description in the questioned deed as far as it is given, with the original deed by which the grantor acquired the tract of which this is a part, the data contained in the questioned deed shows definitely that the grantor intended to convey that tract, less tracts A and B, contained within the line drawn around tracts A and B, and excluding tract X. Mr. Howard states that it is a tract including tracts A and B, and then he excepts those two tracts. The reference to tracts A and B alone identifies the land intended to be conveyed. To hold otherwise is contrary to that rule of law announcing that every deed ought to be so construed that the intent of the parties may prevail and not be defeated. A line running North-

erly and Southerly cannot be injected into the description at any place which runs between tracts A and B, because Howard definitely locates the lines around these two tracts. But the court says by this decision that it cannot tell where Howard intended to locate the property.

It is difficult to conceive of a deed not complete, more definitely supplying the means for identification than in this case. Here Mr. Howard definitely locates the tract owned by him in the proper quarter section. He ties into the proper corner. He definitely locates the beginning point, then definitely describes five difficult courses, all but the closing one. The furnishing of one line from the termini of Howards last call to the place of beginning encloses a tract of land owned by the grantor.

Appellant is entitled to have applied, reasonable rules of construction, aided by extrinsic evidence, to identify the property.

POINT 2.

THE COURT ERRED IN HOLDING THAT IT IS EITHER IMPOSSIBLE TO DETERMINE WHAT HOWARD HAD IN MIND, OR CONJECTURE INDULGED, ONE WOULD HAVE TO DIVINE THAT ANY NUMBER OF AREAS COULD BE SAID TO HAVE BEEN INTENDED.

As we have stated under point 1, the description as given clearly shows the intention of the grantor to cover that land of which the theatre tract "A," and Wood tract, "B" were a part. Tracts A and B are located in opposite corners of the area described, they are included in the description and these tracts being excepted it is

evident Mr. Howard intended to convey that land which lies between them, no other construction is possible. The grantor does not say 2.75 acres more or less of a tract within the perimeter of that part of the description given, the meets and bounds description is first given, and then it is followed by the words "containing 2.75 acres more or less." For the court to say the grantor might have intended to convey some indefinite 2.75 acres of a larger tract, requires the placing of the importance of the reference to acreage ahead of the meets and bounds description as given, such is not a fair construction of the deed. The reference to the acreage is but in aid of the description, to show that the grantor intended to convey a large tract and not a small one. It cannot be said, where the four sides of the property are enclosed by a described line or call, that these calls can be ignored and the acreage controls, especially when the acreage is followed by the words "more or less"; the law is just the opposite; where calls are given, they control. See Thompson on Real Property, Perm. Ed., Vol. 6, Sec. 3345 stating:

> "The most material and particular part of the description controls that which is less natural and certain. A description by metes and bounds controls a statement of the quantity, unless a contrary intention appears in the deed."

POINT 3.

THE COURT ERRED IN HOLDING THAT ABSTRACTORS AND LAWYERS SHOULD BE ABLE TO TURN DOWN A TITLE BASED ON THE CONTENTIONS OF SUCH AN ASSERTED ILLUSIONARY INTENTION OF A DECEASED.

It is recognized that abstractors and lawyers in examining titles accept documents as they appear of record. Abstractors compiling an abstract show those documents affecting the title as given, and examining attorneys rely on the documents as abstracted. Neither are required to determine from the documents what the intent of the party or parties executing the same was. In order to perfect the instrument making up the title, where an omission is apparent, and where a grantor such as in this case is deceased, the courts are the only ones empowered to supply an omission. True abstractors and lawyers may turn down titles where imperfect descriptions are contained in instruments making up the title but that does not mean the instrument cannot be reformed. Reformation is the equitable procedure available to those affected by discrepancies in deeds.

This reasoning has no bearing on the question whether the deed contains sufficient data to permit the omission to be supplied.

POINT 4.

THE COURT ERRED IN CONSIDERING THE LAST STATEMENTS IN THE DESCRIPTION AND IN TREATING THE SAME AS CALLS WHEN IT SHOULD HAVE REJECTED THE SAME AS BEING CUMULATIVE AND NOT A PART OF THE DESCRIPTION.

As pointed out in appellant's original brief, Devlin states that a deed is not void for uncertainty because there may be errors or an inconsistency in some of the particulars. If the land conveyed can be identified by

the other calls of the description an impossible or senseless course will not be considered. Here the land can be identified by the five calls of the description.

This court says in its opinion as rendered:

> "Howard failed to close the fifth and sixth courses in the abortive deed, and he tangentially described a course reflected in the dotted line on Figure 2, coursing counter-clockwise instead of clockwise and commencing from the real point of beginning to the target which he described as a point '*from* beginning,' which makes no sense."

As heretofore stated, that part of the description which makes no sense expresses nothing more than the grantors intention to locate the termni of the fifth call, it is not a call nor is it a part of the description and it was not intended to be. The location of the fifth call is definite and its length is given, Mr. Howard having particularly described the bearing and distance of the fifth call thusly: "N 46°25′ W 404 ft more or less," this is the end of the call of the description, from then on the intent was to locate the termni of the fifth call with reference to the place of beginning, this added nothing, and therefore the use of the words, "from beginning" should not be confusing. In fact this part of the deed should not be taken into consideration at all under those authorities cited by appellant in her brief; without considering the above mentioned words, all that is needed to make the description complete is to draw a line from the termni of the fifth call as given, to the place of beginning, in so

doing it would enclose a tract of land which evidence will show was owned by Mr. Howard at the time he made the deed.

Not only did appellant point out in her brief, the law as announced in Devlin on this subject but we also quoted from Thompson on Real Property, stating, after an accurate description, an inaccurate description following which is merely cumulative will be rejected.

The court says the Losee case cited by appellant is complimented by the phrase "to the place of beginning." While appellant is mindful of that fact our reason for relying on the Losee case as authority is because this court therein cited Patton on Titles, Sec. 74, p. 365 stating the following:

> "even when the lines are continuous they may fail to enclose any tract owing to failure of the final line to return to the starting point."

The Losee case also cites Ransberry v. Broadhead, 174 Atl. 97 in which case the deed did not recite "to the place of beginning." It is presumed from the above statement and cases cited in the Losee case that this court will not hold any description inoperative simply because the last course is not given or that the words "to the place of beginning" are omitted.

POINT 5.

THE COURT ERRED IN HOLDING THAT THE PROPERTY WHICH APPELLANT CONTENDS WAS INTENDED TO BE DESCRIBED CONTAINS CLOSE TO FIVE ACRES.

Appellant critcised respondent for injecting into their brief statements not in evidence, for this reason appellant did not think it proper to brief and argue facts not in evidence.

If appellant were afforded the opportunity to introduce extrinsic evidence in this case the evidence would show that the property is located on Holladay Boulevard, that the description of the tract runs to the centre of the street, that the street is a four rod wide street and that the frontage along this boulevard runs 6.15 chains, causing approximately .3 acre of the property described to be in Holladay Boulevard. That is the reason the grantor excepted the roads in his deed.

Evidence will further show why the grantor intended to exclude from the description that tract at the southwesterly corner, marked by this court as tract X; this tract contains in excess of one acre. It is evident from the original deed that the whole of the tract acquired by the grantor contained but 6.58 acres.

As stated in point 2, Mr. Howard having located all but the closing call of the tract by a meets and bounds description the reference to acreage is but cumulative and descriptive, it is not controlling. It is apparent the grantor did not know just what the property contained in acreage, his reason for referring to it as 2.75 acres more or less. It is conceded that had the grantor but said 2.75 acres more or less of the tract owned by him in the NW¼ of SE¼ of Sec. 10, T. 2 S., R. 1 E., without further indentifying the tract, the grant would be so in-

definite and uncertain that it would not be possible to know what 2.75 acres was intended, but that is not this case, here the grantor first used the meets and bounds calls of the description, which is controlling.

POINT 6.

THE COURT ERRED IN REFUSING TO REMAND THE CASE TO THE TRIAL COURT WHERE EXTRINSIC EVIDENCE MIGHT BE INTRODUCED TO EXPLAIN THE INTENT OF THE GRANTOR.

The court in its opinion states:

> "It is significant that after the execution of the disputed deed, Howard executed another one in favor of Mrs. Howard, covering an area near Tract A, but much smaller, which deed seems operative and accepted as an effective conveyance."

The lower court having granted judgment on the pleadings, appellant was not afforded the opportunity to explain why the deed herein was given. If the case had been tried this could have been explained. Therefore it is unfair at this stage of the case to give any significance to this act on the part of Mr. Howard.

It is further evident from the record of the case as it now stands that appellant, if given the opportunity to present her case could produce an engineer who would testify that he could locate the property by the description. This court wholly overlooks the law announced in the cases cited by appellant in her brief as to this point. Here we have a description sufficient in itself to identify the land, and appellant is entitled to introduce extrinsic

evidence for the purpose of applying the description to the surface of the earth and thus identify it with the tract in controversy. The defect in the deed is not a patent defect. There is sufficient data included in the deed when placed side by side with the deed by which Howard acquired title to the original tract, to show intent, and appellant is entitled to introduce evidence in aid of the description. That evidence must of course, be competent evidence and the trial court will require competent evidence.

While we are mindful of the fact that parol evidence is not admissible to enlarge the terms of the written instrument or to add to it, still the authorities hold that parol evidence is always admissible in aid of application of the description to its subject matter. Here as heretofore pointed out, Mr. Howard followed difficult courses with particularity enclosing a tract of land which he owned; there could be no tract other than that which appellant contends was intended to be conveyed; evidence will show that the tract described is all that Mr. Howard had in that area which had not been conveyed, this is important to appellant's case.

Devlin says great liberality is always exercised in constructing that part of the deed in which the property conveyed is described and the description will be sufficient if it supplies the means for identifying the land to be conveyed.

This Honorable court has in numerous decisions where summary judgments have been granted by the

lower court, reversed the same and has remanded the case to the trial court; this on the ground that all inferences must be resolved in favor of the party against whom the judgment is sought. Here appellant has not even been afforded the opportunity to submit affidavits, excepting that referring to the testimony of an engineer if called, to show the intent of the grantor such as a party does in a proceeding on a motion for summary judgment, neither is appellant favored, by this decision, with these inferences.

The deed here in question furnishes sufficient data for appellant to be given the opportunity at a hearing to produce evidence to aid the description. Tiffany on Real Property cited in our original brief says, the broad principles hold that a conveyance will not be declared void for insufficiency in its description of the property which it purports to convey *if it is possible by any reasonable rule of construction, aided by extrinsic evidence,* to identify the property. (Italics supplied.)

The case should be remanded to the trial court for the taking of evidence in aid of the description to show the intent of the grantor.

Respectfully submitted

BACKMAN, BACKMAN and CLARK,
Attorneys for Defendant-Appellant